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North America

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

January 24, 1997

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Re: In the Matter of The Merger of MCI Communications
Corporation and British Telecommunications plc

GN Docket No. 96-245

Dear Secretary Caton:

Enclosed are an original and four copies of France Telecom's Comments pursuant to Public Notice DA 96-2079, released December 10, 1996 in the above-captioned proceeding. Copies of our Comments were hand-delivered or mailed today in accordance with the attached service list.

Sincerely,

Theodore W. Krauss
France Telecom North America
Vice President
Legal and Regulatory Affairs

Enclosures

cc: ITS, Inc.
International Reference Room
Wireless Reference Room

024

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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The Merger of MCI Communications)
Corporation and British)
Telecommunications plc)
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GN Docket No. 96-245

COMMENTS OF FRANCE TELECOM

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January 24, 1997

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SUMMARY

France Telecom (“FT”) is the world’s fourth largest telecommunications company, Europe’s second largest operator, a major investor in Sprint which competes with MCI, and a partner in the Global One worldwide FT- Sprint-Deutsche Telekom joint venture which competes with British Telecommunications plc’s (“BT”) and MCI’s venture “Concert”. Furthermore, FT desires the furtherance of worldwide competition, and consequently is interested in the evolution of a consistent, predictable and non-restrictive application of the US Federal Communications Commission’s (“Commission”) “effective competitive opportunities test” (“ECO”), and more generally in US policy on foreign carrier entry into the US market. Thus, FT clearly has an interest in this proceeding.

The proposed merger would affect competition not only on the very large US-UK route but also on the trans-atlantic route between Europe and the US, as well as worldwide and throughout Europe and the US. FT encourages the several appropriate regulators, including the Commission, to address the many anti-competitive aspects applicable in their respective jurisdictions of the proposed merger of BT, the dominant UK operator, and MCI, the second largest US long distance carrier.

FT respectfully suggests that, if the Commission approves the BT-MCI Application, the Commission should impose the conditions presented in Section II of the comments below, to the extent such conditions fall within its jurisdiction as determined in coordination with the European Commission. FT expresses no opinion on whether the UK passes the ECO test, but respectfully requests that the Commission not apply its ECO

test in a restrictive, inconsistent or unpredictable manner which would have the unintended consequence of hindering the furtherance of competition.

FT respectfully submits that any consideration of the limited *de facto* competition in the UK market would risk rendering the ECO test less predictable and more restrictive, and lead the Commission down a slippery slope toward an approach involving micro-management of foreign liberalization developments. Such an approach would require the Commission to undertake the awkward task of reviewing in detail a complicated and evolving market and to take into account factors such as the activities listed in the attached memorandum (Exhibit I) which describes certain activities of BT during the last 12 months which have been or could be regarded as anti-competitive. In the interest of further clarity of ECO test jurisprudence, FT respectfully urges the Commission to focus its analysis on the concrete *de jure* elements presented in the BT-MCI Application without getting bogged down by the BT-MCI Application's view of the current state of the UK market which would be difficult for the Commission to verify.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
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The Merger of MCI Communications)	GN Docket No. 96-245
Corporation and British)	
Telecommunications plc)	
_____)	

COMMENTS OF FRANCE TELECOM

Pursuant to the Commission's Public Notice (DA 96-2079) released December 10, 1996, France Telecom ("FT") respectfully submits its comments on the request by MCI Communications Corporation ("MCI") and British Telecommunications plc ("BT"), collectively the Applicants, for Commission approval of the proposed merger of BT and MCI.¹

I. INTRODUCTION

FT's interest in the BT-MCI Application is manifold since the proposed merger would affect competition not only on the very large US/UK route but also on the trans-atlantic route between Europe and the US, as well as worldwide and throughout Europe and the US. An approval of the BT-MCI Application would lead to the creation of the second largest telecommunications group in the world.²

¹ MCI and BT filed a three volume application with supporting documents. See The Merger of MCI Communications Corporation and British Telecommunications plc, Applications and Notification, Volumes One, Two and Three (December 2, 1996) ("BT-MCI Application").

² See Brussels probes BT/MCI Link-up, Financial Times, January 3, 1997, at 2.

FT, in its own right, is the fourth largest³ telecommunications company in the world and the second largest in Europe, and as such has a keen interest in the maintenance of fair competition worldwide. Furthermore, FT is an equal shareholder in the three-way Global One global telecommunications services joint venture among Sprint - Deutsche Telekom - FT which competes with the current BT-MCI joint venture named "Concert." Finally, FT has a direct 10% investment in Sprint, a competitor of MCI. As the Commission is aware, FT's investment in Sprint of nearly \$2 billion is the second largest telecommunications investment in the United States - - second only to the current 20% BT investment in MCI.⁴

FT cares deeply about the development of worldwide competition. Consequently, FT has an interest in coherent and consistent application of general US policy on foreign carrier entry into the US market. More specifically, FT is interested in a coherent and consistent application of the Commission's effective competitive opportunities ("ECO") test⁵. FT embraces the challenges of fair competition both in its domestic market and in other open markets abroad, and does not wish to see market opening initiatives abroad discouraged by a restrictive, inconsistent or unpredictable application of the Commission's ECO test.

³ With 1995 consolidated revenues of \$29.6 billion, net income of \$1.8 billion and over 32 million telephone lines in service, France Telecom is the world's fourth-largest telecommunications carrier. In addition to local and long-distance telephony, France Telecom provides businesses and consumers with data, wireless, on-line, Internet, cable-TV and value-added services. Through its subsidiary TDF, France Telecom is also a leading European television and radio broadcaster.

⁴ FT's partner in Global One, Deutsche Telekom, also invested an equal amount in Sprint.

⁵ See Market Entry and Regulation of Foreign-affiliated Entities, 11 FCC Rcd 3873 (1995) ("Foreign Carrier Entry Order").

As BT-MCI acknowledge, the ECO test will apply to the Commission's review of the BT-MCI Application. While the Commission may, or may not, be of the opinion that it is a forgone conclusion that the UK meets the ECO test, FT is interested in future applications of the test due to its interest in open markets -- not just in the UK -- and equal opportunities for all carriers from equally open markets (i.e., other EU Member States). For example, the French market is opening rapidly,⁶ and FT expects that in the context of the ongoing Sprint Corporation proceeding⁷ pursuant to which Sprint is required to report on liberalization developments in France and Germany until such markets meet the ECO test, the Commission will soon conclude that the French market meets the ECO test,⁸ particularly if the Commission determines that the UK passes the ECO test.

⁶ Liberalization developments in France were recently the subject of a report and comments before the Commission. On July 31, 1996, Sprint Corporation filed with the Commission a Progress Report on Liberalization Developments in France and Germany ("Progress Report"). The Commission released a Public Notice on August 7, 1996 seeking comments on the Progress Report. In response to comments submitted by several interested parties in September, FT filed Reply Comments highlighting the many key steps taken in France to liberalize the telecommunications market. Since the Progress Report and FT's September 1996 Reply Comments, many additional strides have been made in France to fully open the market. See footnote 8 *infra*.

⁷ See Sprint Corporation, 11 FCC Rcd 1850, at 1872 (1996) ("Sprint Order")

⁸ Like the US, France passed sweeping telecommunications legislation in 1996 pursuant to which France will be at least as open to competition as the US market effective no later than January 1, 1998. Many developments have occurred even in the short period since FT's September 1996 submission in the Sprint Order proceeding. A new regulatory authority has been created, and France is currently well into the process of adopting several decrees to further implement the new legislation, just as the FCC is now in the midst of implementing rules for the US Telecommunications Act of 1996. Also, several licenses have been granted to new entrants, including US operators, and France Telecom is facing increasing competition in many already liberalized services from new entrants.

FT's comments below are primarily directed at an analysis of how the Commission should apply the ECO test to the BT-MCI Application. However, FT recognizes that the Commission will also take into consideration other issues of public interest. In this regard FT submits that the BT-MCI merger will have important adverse effects on competition even if the UK is deemed to meet the ECO test absent the prescription of further safeguards and conditions.

Most importantly, FT encourages the several appropriate regulators, including the Commission, to address the many anti-competitive aspects of the proposed merger applicable in their respective jurisdictions. FT encourages the Commission to consult with the European Commission on the BT-MCI Application to ensure that all appropriate safeguards to competition are adopted by the appropriate regulator(s). In this connection, FT wishes to inform the Commission that FT has encouraged the European Commission⁹ to address several concerns which arise due to the adverse impact of the proposed merger on competition in the European market and on the US/UK and the trans-atlantic routes. Based on FT's review of the proposed merger in the context of the European Commission's proceeding, FT expects that there are many concerns, beyond application of the ECO test, which will be addressed both by the Commission and US Department of Justice (the "DOJ").

FT's comments below present a few basic non-ECO considerations, and suggested public interest conditions, followed by an analysis of the ECO test as applied to the BT-MCI Application. FT expresses no opinion on whether the UK passes the ECO test, but

⁹ The European Commission instituted a proceeding on the proposed BT-MCI merger. See Prior Notice of a Proposed Concentration, Case No. IV/M.856 - BT/MCI (II), (96/C 391/11), published in the Official Journal of the European Communities, December 28, 1996 ("EC Proceeding"). France Telecom has submitted comments in the EC Proceeding.

respectfully requests that the Commission not apply its ECO test in a restrictive manner which would have the unintended consequence of indeed hindering the furtherance of competition.

II. NON-ECO TEST CONSIDERATIONS

In addition to the ECO test analysis of the proposed merger, on which we comment further below (in Section III), the Commission will no doubt wish to consider several other public interest factors in its review of the of the BT-MCI Application. In this regard FT submits the following items for consideration by the Commission.

A. Suggested Conditions

In order to facilitate coordination between the Commission and the European Commission FT wishes to share for the record in this proceeding that in the context of the European Commission's ongoing review¹⁰ of the BT-MCI transaction FT has noted that the proposed concentration raises significant risks to fair competition. As a preliminary matter FT has requested that the European Commission demand commitments from BT and MCI on several issues listed below. This list of suggested conditions should not necessarily be deemed an exclusive list of conditions required to ensure fair competition in the event the BT-MCI Application is approved. Additional conditions may well be deemed necessary following an in-depth investigation by the European Commission, the Commission and the DOJ. It is essential that the several regulatory authorities reviewing the proposed BT-MCI merger not rush to judgment. The proposed merger raises serious novel and difficult issues, particularly with respect to trans-Atlantic, European, and US competition matters which deserve careful analysis to ensure that the benefits of the emerging competition in the US and Europe are not adversely affected. FT respectfully

¹⁰ See EC Proceeding.

suggests that, if the Commission approves the BT-MCI Application, the Commission should impose the conditions presented in this Section II, to the extent such conditions fall within its jurisdiction as determined in coordination with the European Commission.

The preliminary list of suggested remedies required to safeguard competition which FT has submitted to the European Commission is the following:

1. implementation of equal access¹¹ in the UK, to enable competition in the long distance and international markets in view of BT's dominant position on the access market.

Certainly when looking at the size of the US/UK route, the US market share of MCI (approximately 18%, or double Sprint's¹²) and noting BT's unique advantage of providing no equal access service in both directions (US to UK and UK to US) which is not available to other carrier's in the UK market, any approval of the proposed merger should be preconditioned on the establishment of a quick schedule for implementation of equal access.

2. a structural separation between the national (UK and USA) and international operations of the combined BT-MCI.
3. an obligation to unbundle BT-MCI offerings: the combined venture must conclude separate contracts for services relating to UK-US traffic, on the one hand, and other services, on the other hand. Each of these separate contracts must set out the terms and conditions of each individual service sold thereunder and attribute any quantity or other discount to a particular service.

¹¹ FT means "equal access" as the ability to offer long distance services through equal length dialing codes.

¹² FCC Long Distance Market Shares: Third Quarter, 1996, released January 15, 1997.

4. an account separation with regard to the different operational activities mentioned above (in condition 2) of the combined BT-MCI.
5. an audit of the several BT-MCI divisions by an independent auditor every twelve months.
6. an obligation to provide yearly reports to the European Commission on all of the foregoing.

FT believes that the above conditions would be necessary to promote competition and to create structural transparency and to facilitate ongoing verification of the proposed merged entity's market behavior (e.g. discrimination and anti-competitive activities) in the EU and US. Such conditions would help, in the event the BT-MCI Application is approved and the merged entity is later found to abuse its dominant position in a given market, competitors to enforce compliance with applicable law through action before the courts and other competent authorities.

B. Openness and Transparency still Required on US-UK Route

The reasons that required the Commission to impose conditions on the initial BT-MCI transaction are still (even more so) relevant. FT notes that MCI does not ask to be treated as non-dominant on US-UK route.¹³ Given that BT is still dominant in the UK, MCI should be regulated as a dominant carrier on the US-UK route. As pointed out by MCI in a September 1996 Commission filing, BT is still dominant and controls bottleneck facilities in the United Kingdom¹⁴. As explained by MCI, BT is the dominant carrier for

¹³ See The Merger of MCI Communications Corporation and British Telecommunications plc, Applications and Notification, Volume Two, Sections A-L, (December 2, 1996) ("BT-MCI Application, Vol. 2"); see BT-MCI Application, Vol. 2., Section B, p.7.

international facilities based services; BT still controls well over 90 % of the local termination points in the United Kingdom; and BT still has the most fully developed long-distance network to which international carriers must interconnect¹⁵. While no longer holding a *de jure* monopoly on any market segment, BT is still the *de facto* dominant carrier.

More generally, FT urges retention of all non-discrimination and reporting conditions set out in the original BT-MCI Order.¹⁶

C. Accounting Rate Issues -- US-UK/Europe

Because of the size of the UK-US traffic stream, the BT-MCI proposed merger raises concern with respect to international traffic flows to the extent that transatlantic traffic may be handed off within one company and service provided on an end-to-end basis¹⁷. As the Commission has previously noted, “[w]hen the accounting rate regime was devised, there was no conception that a single carrier might want to control end-to-end-service, including its own international gateway switch, or that a carrier could have direct access to the domestic network at the foreign end on an unbundled basis”.¹⁸ Also, as the

¹⁴ September 6, 1996 Comments of MCI In the Matter of BT North America Inc. Motion to be Reclassified as a Non-Dominant Carrier for US-UK Services, File No. ISP-96-007-ND, at 1-2.

¹⁵ Id. at 2.

¹⁶ See MCI Communications Inc. / British Telecommunications, plc., 9 FCC Rcd 3960 (1994) (“BT/MCI Order”).

¹⁷ The US/UK traffic stream is the USA’s third largest stream, after neighboring Canada and Mexico, and is approximately three times the size (in minutes) of the US/France route. See Telegeography 1996/97, Global Telecommunications Traffic Statistics & Commentary 84-86 (Gregory C. Staple ed.) (figures are for 1994 and 1995 traffic).

Commission is aware, it is hard to monitor the bypass of US-Europe traffic via the UK.¹⁹ Thus, while the Commission's Flexibility Order may offer protection against certain potential abuses²⁰ by BT-MCI, the Commission may wish to consider additional safeguards, such as detailed traffic flow reporting, to ensure transparency of BT-MCI traffic exchanges in the event the Commission approves the proposed merger.

In any case, a separate proceeding should be initiated to address concerns raised by accounting rate and international traffic flow deviations which would be generated by approval of the BT-MCI Application without conditions in such regard. We note that the Commission recently adopted rules governing the regulation of international accounting rates in the Flexibility Order²¹. The BT-MCI Application does not request authorization to benefit from any provisions of the Flexibility Order which would require, among other things, that any arrangement between affiliates such as BT and MCI be publicly filed with the Commission²². Consequently, FT believes the Commission's International Settlements Policy²³, and more generally the Commission's interdiction against "special

¹⁸ Regulation of International Accounting Rates, CC Docket No. 90-337 (Phase II), Fourth Report and Order (released December 3, 1996) ("Flexibility Order") at ¶ 15.

¹⁹ See ¶ 13 of the International Settlement Rates, IB Docket No. 96-261, Notice of Proposed Rulemaking (released December 19, 1996) ("Benchmark NPRM") (noting routing of bilateral traffic through third countries to take advantage of accounting rate arbitrage).

²⁰ For example, pursuant to the Flexibility Order, the Commission will not permit US inbound traffic that is still subject to the ISP (i.e. traffic from a foreign carrier with whom a US carrier does not have an alternative payment arrangement) to be routed through a foreign carrier that has an alternative payment arrangement with a US carrier. Flexibility Order at ¶ 49.

²¹ See id. ¶¶ 1-5 & Appendix A.

²² Id. at ¶ 36.

concessions”²⁴, should continue to apply to BT and MCI. BT and MCI should be required to provide US-European service on the basis of proportionate return and equal division of non-discriminatory arm's length accounting rates and without special concessions. In the event the merger is approved, the Commission should specifically require BT, MCI, and the merged entity and its affiliates, to strictly comply with the Commission's International Settlements Policy and its prohibition against special concessions. Furthermore, the Commission should specify that any deviation from such rules should require a separate public proceeding with full opportunity for interested third parties to comment and for the Commission to analyze in depth such matter. FT notes that the Flexibility Order would require an expedited public process.²⁵ However, due to the important and novel public interest issues which would be raised by the prospect of allowing a merged BT-MCI to deviate from the Commission's ISP, and recognizing MCI's US domestic market share and the size of the UK-US route, the Commission should ensure that the matter receives careful public scrutiny and formal Commission staff analysis and action.

Furthermore, the Commission may well wish to wait for completion of its current Benchmark NPRM proceeding prior to ruling on such matter. This would allow the Commission to develop, and share with the public, a comprehensive policy on

²³ See Implementation and Scope of the International Settlements Policy for Parallel Routes, CC Docket No. 85-204, Report and Order, 51 Fed. Reg. 4736 (Feb. 7, 1986) (ISP Order), modified in part on recon., 2 FCC Rcd 1118 (1987) (ISP Reconsideration), further recon., 3 FCC Rcd 1614 (1988). See also Regulation of International Accounting Rates, 6 FCC Rcd 3552 (1991), on recon., 7 FCC Rcd 8049 (1992); Policy Statement on International Accounting Rate Reform, 11 FCC Rcd 3146 (1996) (“Accounting Rate Policy Statement”).

²⁴ 47 C.F.R. §63.14.

²⁵ See Flexibility Order at ¶ 57; 47 C.F.R. §64.1002.

international services before considering any petition by BT-MCI to deviate from the Commission's ISP policies. Otherwise, all relevant regulatory factors may not be available to commenting parties and the Commission.²⁶

III. APPLICATION OF ECO TEST

As discussed below, the ECO test consists of four factors which the Commission takes into account to determine whether a foreign market offers competitive opportunities to US carriers: (i) *de jure* openness of the foreign country's international facilities-based market; (ii) the interconnection regime; (iii) the existence of competitive safeguards; and (iv) the regulatory framework. The Commission, in the Foreign Carrier Entry Order, recognized that progress toward competition takes time and that not all factors may be satisfied at the moment that a foreign carrier desires to enter the US market. For this reason, the Commission stated that a "favorable" ECO finding could be made if effective competitive "opportunities exist or if it is reasonably certain that they will be available in the near future."²⁷ The Commission's stress on the "near future" clearly contemplates that a carrier might satisfy the ECO test even if its home market did not, today, meet the four ECO factors, but it was reasonably certain that it would do so in the "near future." Accordingly, even if the UK market did not afford US carriers effective competitive opportunities at this precise point in time, the Commission should consider how certain it is that the United Kingdom will meet the ECO factors and the length of time that it will take to do so.²⁸

²⁶ The Flexibility Order was one of two proceedings designed by the Commission to regulate competition in international services, the other proceeding being the recently launched Benchmark NPRM released on December 19, 1996. See Flexibility Order at ¶ 9.

²⁷ Foreign Carrier Entry Order, 11 FCC Rcd at 3891.

A. Application of the ECO Test to BT-MCI

The BT-MCI Application must, therefore, be reviewed in light of the four factors of the ECO test and the Commission's required timetable -- at present or in the near future -- as to when the UK market would meet that test. The BT-MCI Application describes in detail the extent to which, in BT-MCI's view, that market satisfies the ECO criteria.

1. De Jure Openness of UK International Facilities-Based Market

The first element of the ECO test -- the important predicate for application of the other ECO factors -- is whether there is "the legal, or *de jure*, ability of US carriers to enter the foreign market and provide facilities-based service."²⁹ The Commission has stated that, in lieu of the broader range of criteria originally suggested in the Foreign Carrier Entry NPRM, it is now placing a "greater emphasis on the first factor of the test: the legal ability to provide international facilities-based service."³⁰ Without the presence of *de jure* competition in the facilities-based IMTS market, the Commission has determined that effective competitive opportunities are absent. Conversely, if there are "no explicit legal restrictions on entry," then the Commission will take the next step in its analysis and look to the other ECO factors.³¹

²⁸ Sprint Order, 11 FCC Rcd at 1857 (where effective competitive opportunities do not exist, "clear and concrete commitments" are necessary to assure that such opportunities are available "in the near future").

²⁹ Foreign Carrier Entry Order, 11 FCC Rcd at 3890. To ensure that there could be no misunderstanding as to whether the test is one that requires *de jure* as opposed to *de facto* competition by a US carrier, the Commission expressly stated that "the actual facilities-based presence of a US carrier in a foreign country is not required under our test" Id. at 3894.

³⁰ Id. at 3890.

³¹ Id. at 3892; Sprint Order, 11 FCC Rcd at 1857.

In general, the presence or absence of such legal restrictions is self-evident: a market either is legally open to US-based investment, or it is not.³² Thus, the Commission has concluded that the adoption of the test of *de jure* openness provides "a higher level of predictability to foreign carriers seeking entry."³³ As stated above, FT agrees that a predictable standard is desirable.

As conceded in the BT-MCI Application, the British international facilities-based market had been a legal duopoly until late last year.³⁴ As reported in the application, however, on June 6, 1996 the Department of Trade and Industry ("DTI") formally invited companies to apply for Public Telecommunications Operators ("PTO") licenses to provide international facilities-based services, which are defined to include IMTS between the United Kingdom and the United States.³⁵ At this point -- and not before -- the British Government articulated its "clear and concrete commitments" to making effective *de jure* competitive opportunities available in the near future. That commitment was satisfied

³² See, e.g., Sprint Order, at 1857 (concluding summarily in 1995 that *de jure* competition is absent in France and Germany and, therefore, that effective competitive opportunities do not exist because US carriers are "currently prohibited as a matter of law from entering" the IMTS facilities-based market in both countries and that their commitment to implementation of competition two years away "is too distant in time to be considered competition in the *near future*").

³³ Foreign Carrier Entry Order, 11 FCC Rcd at 3890.

³⁴ See The Merger of MCI Communications Corporation and British Telecommunications plc, Applications and Notification, Volume One, (December 2, 1996) ("BT-MCI Application, Vol. One") at 19-20.

³⁵ UK to Open up International Services: BT-Mercury Duopoly Ended, DTI Press Notice (June 6, 1996).

when, on November 18, 1996, the DTI issued draft licenses to 45 applicants, including many US companies.

FT notes that as of today there is scant *de facto* international facilities-based competition between the United States and the United Kingdom and that there is no US facilities-based carrier competing in the IMTS market on the US-UK route. Furthermore, in both the local and intercity services markets, BT, even by the statistics set forth in the BT-MCI Application, must be considered the dominant provider.

The BT-MCI Application describes the limited impact of “US resale competitors” on BT’s revenue and market share.³⁶ In addition, it discusses extensively what is described as a “fully open” UK intercity market, apparently conceding that there is, as yet, not much in the way of real *de facto* competition to BT in this market.³⁷ All these facts, howsoever massaged and characterized to demonstrate the apparent or real openness of the British market are, of course, irrelevant under the Commission’s *de jure* test to determine, simply, whether US carriers may legally participate in the facilities-based IMTS market.

In summary, however, given the June 6 announcement by DTI, with the subsequent licensing of facilities-based competitors at the end of 1996, FT agrees with BT-MCI that, for purposes of the ECO test, there are now no *de jure* restrictions on the provision of international facilities-based services between the United States and the United Kingdom and that this leg of the ECO test has been satisfied.

³⁶ BT-MCI Application, Vol. One, at 22.

³⁷ *Id.* at 37-43. As set out in the BT-MCI Application, BT still has 88.3% of the residential long distance market, by call revenue shares, and, with Mercury, the two established duopolists have a full 94% of that market. *See id.* at 42 (citing OFTEL market information for January-March 1996).

2. Interconnection

The second element of the ECO test examines the totality of the interconnection regime, including charges, terms and conditions for interconnection to the foreign carrier's domestic facilities for termination and origination of international services, and adequate means of monitoring and enforcing the conditions.³⁸ Where a carrier is dominant in the provision of local access services, the Commission's expectations are that the terms and conditions for interconnection should be publicly available on a nondiscriminatory basis and at a reasonable price.³⁹ The Commission also notes, however, that a range of legal or marketplace factors could be used to justify the adequacy of an interconnection regime.⁴⁰ Further, as the Commission is aware from its own experience and from the ongoing challenge of its interconnection rules before the US courts, the establishment of an interconnection regime is a very complex process. As a practical matter, and for reasons of comity, the Commission may prefer to restrain itself from engaging in an intrusive micro-management oriented analysis of foreign interconnection regimes when applying its ECO test.

The BT-MCI Application describes the documents and rules by which the terms and conditions for interconnection can be evaluated and, further, argues that BT's interconnection charges are "reasonable."

First, for purposes of the ECO test, BT appears to be legally obligated to interconnect with other providers on a nondiscriminatory basis. Pursuant to Condition 13

³⁸ Foreign Carrier Entry Order, 11 FCC Rcd at 3892.

³⁹ Id.

⁴⁰ Id. at 3893.

of its License, BT must interconnect its network with other individually licensed carriers. In addition, Condition 17 of the BT License prohibits BT from showing “undue” preference or “undue” discrimination with respect to all of its obligations under the License, including its obligations under Condition 13. These conditions, without any additional showing, indicate that, for purposes of the ECO test, BT must interconnect and that it must do so on a nondiscriminatory basis.⁴¹

No interconnection regime will be perfect. With regard to the quality of interconnection services, FT notes, the Commission does not require equal access,⁴² although equal access “would be illustrative of adequate terms and conditions for interconnection in the foreign market.”⁴³ Nor does the BT-MCI Application attempt to demonstrate that equal access has been made available in the United Kingdom.

The second legal requirement is one that requires adequate means of monitoring and enforcement of the conditions. The Foreign Carrier Entry Order provides examples of conditions which would satisfy such requirement and there is no indication that such examples are exclusive of other approaches.⁴⁴ As a general policy matter, FT respectfully urges the Commission to avoid any statement in its decision in the pending matter which would indicate that such examples are exclusive criteria which will be considered by the Commission in evaluating the interconnection monitoring and enforcement factor of the

⁴¹ See ACC Global Corp. and Alanna, Inc., 9 FCC Rcd 6240, 6253 (1994) (concluding that the license conditions “make explicit” the regulatory commitment to ensure that BT’s competitors can interconnect with BT’s local network).

⁴² Foreign Carrier Entry Order, 11 FCC Rcd at 3893.

⁴³ Id.

⁴⁴ Id. at 3892.

ECO test. Here, BT is, among other things, under a legal obligation to offer standard interconnection services at standard prices.⁴⁵ FT submits that such a legal obligation alone should suffice to meet the interconnection monitoring and enforcement requirement under the ECO test if the Commission wishes to avoid an overly restrictive ECO test.

The third requirement is that terms and conditions and prices for interconnection be “reasonable.” The Commission did not, in the Foreign Carrier Entry Order, establish a benchmark for reasonableness, nor did it set out a method for ascertaining whether a particular interconnection charge was reasonable. The BT-MCI Application cites to a consultancy report commissioned by BT for the proposition that, of six countries (including six operating companies in the United States) BT’s interconnection prices were the lowest of the group.⁴⁶ FT has not undertaken the task of verifying the accuracy of the methodology and findings of the study; nor, presumably, will the Commission wish to do so.

The Commission need not use its decision in the pending application to provide some additional certainty with respect to what would constitute “reasonable prices,” though some clarity on this issue might be helpful. Whether or not the Commission chooses to do so, however, FT urges that it not render a decision that would imply that only those prices that compare favorably with the US prices or that are the absolute lowest of any to which they might be compared worldwide will satisfy the reasonableness standard. Such an implication would have two unfortunate consequences: either it would encourage false or misleading comparisons among countries, as carriers strive to satisfy

⁴⁵ BT-MCI Application, Vol. One, at 24.

⁴⁶ Id. at 27 & n.47.

the new benchmark, or it would establish an unreasonably restrictive standard for meeting the ECO test, thereby making the ECO determination far more restrictive in its application than the Commission had intended.

Rather, the Commission may wish to clarify that it will seriously consider any rational interconnection pricing methodology,⁴⁷ since it is possible that the comparison of absolute price figures between countries may not offer a fair comparison. Interconnection charges may legitimately be higher in certain countries than those encountered in the US or elsewhere and yet be reasonable.

Finally, the BT-MCI Application, as noted above, discusses at great length what it characterizes as open and competitive local and intercity services markets. The evidence of new entry, in its totality, appears to indicate nascent competition -- at least in some markets and to some customers. Presumably, it is being offered to demonstrate the existence of reasonable and nondiscriminatory interconnection charges in the UK and to permit the Commission to conclude that US carriers have access to intercity services, such access being considered relevant to the availability of such charges.⁴⁸ However, the Commission may wish to avoid complicating and obscuring the predictability of the ECO test and refrain from including reference to such limited developments in its ECO analysis.

⁴⁷ Though FT notes that New Zealand has been deemed to pass the ECO test despite the Commission's concern with the apparent lack of a transparent pricing methodology for Telecom New Zealand Limited's interconnection charges. In the Matter of Telecom New Zealand Limited, Application for Authority under Section 214 of the Communications Act of 1934, as amended, to Acquire and Operate Facilities to Provide International Services Between the United States and New Zealand, File No. I-T-C-96-097, (released December 31, 1996) ("TCNZ Order") at ¶ 20.

⁴⁸ See Foreign Carrier Entry Order, 11 FCC Rcd at 3897, 3893.

BT-MCI argue that there are an “increasing number” of sources from which customers and service providers may choose in seeking local exchange line or local measure service.⁴⁹ To be sure, although that number may, in fact, be “increasing,” the BT-MCI Application propounds scant evidence to demonstrate the scope -- whether it be geographic or demographic -- of actual interconnection offerings that are now being, or may be made, available to US IMTS providers.

Similarly, US carriers’ access to British, facilities-based intercity services has been, until recently, limited. As indicated, BT and Mercury have the lion’s share of that market; the other new entrants, including Energis and BR Telecommunications, Ltd., today are not major players. Now, US carriers are legally permitted to provide intercity services, and both AT&T and Global One, which is affiliated with Sprint and FT, have PTO licenses to do so. Presumably, these providers will be in a position to provide intercity services to some US IMTS providers.

FT respectfully submits that any consideration of the limited *de facto* competition in the UK market would risk rendering the ECO test less predictable and lead the Commission down the slippery slope toward an approach involving micro-management of foreign liberalization developments. In the interest of further clarity of the ECO test jurisprudence, FT respectfully urges the Commission to focus its analysis on the concrete *de jure* elements presented in the BT-MCI Application without getting bogged down by the BT-MCI Application’s view of the current state of the UK market which would be difficult for the Commission to verify.

⁴⁹ BT-MCI Application, Vol. One, at 37.

3. Competitive Safeguards

The third ECO factor looks to the existence of “competitive safeguards.” Again, the Foreign Carrier Entry Order is quite specific in articulating the safeguards that the Commission will consider in determining whether this element of the test is satisfied: 1) the existence of cost-allocation rules to prevent cross-subsidization; 2) timely and non-discriminatory disclosure of technical information for interconnection; and 3) protection of carrier and customer proprietary information.⁵⁰

As described in the BT-MCI Application, accounting separation is prescribed in the BT License; OFTEL has the power to investigate unlawful subsidies or cross-subsidies; and OFTEL can take steps to remedy any such unfair or cross-subsidy.⁵¹ The BT-MCI Application does not provide any evidence of actual compliance by BT of the cost-accounting rules, or the extent to which OFTEL has undertaken any investigations or ordered remedial action. Nonetheless, the existence of the rules alone should suffice to demonstrate the presence of the first safeguard.⁵²

Second, BT is required to publish technical information regarding BT’s network in accordance with a certain “Code of Practice on Network Information Publishing Principles”.⁵³ Such publication requirement alone should satisfy the requirement of the second safeguard. FT believes that it would be inappropriate and unnecessarily

⁵⁰ Id. at 3894.

⁵¹ BT-MCI Application, Vol. One, at 45.

⁵² FT notes, however, that New Zealand met the ECO test despite the absence of cost allocation rules. TCNZ Order at ¶ 27.

⁵³ BT-MCI Application, Vol. One, at 46.